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Nos. 81-2147, 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners
v.
SAN CARLOS APACHE TRIBE OF ARIZONA, *et al.*

STATE OF MONTANA, *et al.*,
Petitioners
v.
NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE:

MOTION TO DISMISS FOR LACK OF IN PERSONAM AND SUBJECT MATTER JURISDICTION IN THIS COURT OVER THE STATE COURT WATER RIGHTS ADJUDICATION PROCEEDINGS WITH POINTS AND AUTHORITIES IN SUPPORT

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The Petitioners White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, and the Blackfeet Indian Tribe, Blackfeet Indian Reservation, Browning, Montana, respectfully petition this Court for leave to file a motion entitled "Motion To Dismiss For

Lack Of *In Personam* And Subject Matter Jurisdiction In This Court Over The State Court Water Rights Adjudication Proceedings With Points And Authorities In Support," on the following grounds and for the following reasons.

1. By the Motion which the Tribes seek permission to file, copies of which accompany this Motion, this Court is requested to review the threshold question of whether that part of these Consolidated Cases pertaining to the Arizona and Montana State Court Water Rights Adjudication Proceedings are within the purview of the McCarran Amendment, 43 U.S.C. 666,[1] pursuant to which the Congress, by a limited waiver of sovereign immunity,

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[1] United States Code, Title 43:

Section 666. Suit for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under the circumstances; *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

has permitted the United States to be joined in suits for "general adjudication." [2]

2. The threshold question whether the Arizona and Montana State Courts Water Rights Adjudication Proceedings are within the McCarran Amendment was not passed upon by the Court of Appeals in the Opinions here for review.[3]

ARIZONA CASES

3. The Salt River and principal tributaries of that stream arise upon the Fort Apache Indian Reservation. The White Mountain Apache Tribe claims Reserved Rights in the Salt River and its tributaries.

4. There is here for review a partial adjudication of the Salt River above Granite Reef Dam initiated by the Salt River Water Users' Association, a petitioner in the Arizona cases.[4] In the Arizona State Court, the Petitioner Salt River Water Users' Association seeks to have determined the conflicting rights to the use of water from the Salt River above Granite Reef Dam.

5. The White Mountain Apache Tribe denies that the partial adjudication of the Salt River referred to in the paragraph immediately preceding is within the purview of the McCarran Amendment.

6. The White Mountain Apache Tribe filed with this Court its Petition for a Writ of Certiorari, No. 81-2334, on June 22, 1982, in the case of *White Mountain Apache Tribe v. William French Smith, Attorney General, and James G. Watt, Secretary of the Department of the Interior.* Subject *res* in that pending Petition for a Writ of Certiorari is identical with the subject *res* in the

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[2] Dugan v. Rank, 372 U.S. 608, 617-619 (1963).

[3] San Carlos Apache Tribe v. Arizona, 81-2147, Pet. Ap. A, is reported in 668 F.2d 1093; Northern Cheyenne Tribe v. Adsit, 81-2188, Pet. Ap. 26-52, is reported at 668 F.2d 1080 (CA 9, 1982).

[4] No. 81-2147, Joint Appendix, p. 142, *et seq.*; pp. 146-147; 153A.

partial adjudication of the Salt River "above Granite Reef Dam," which is here as part of No. 81-2147 and 81-2188.

MONTANA CASES

7. The Milk River and the St. Mary River arise upon or traverse the Blackfeet Indian Reservation. Tributaries of the Marias River likewise have their source, border, or underlie that Reservation. In those streams the Blackfeet Indian Tribe asserts Reserved Rights to the use of water.

8. Suits to adjudicate the Milk River, the St. Mary River, and the tributaries of the Marias River were initiated in the United States District Court for Montana.[5] While those suits were pending, the Montana Legislature enacted "Montana's Water Use Act" by passing "Senate Bill 76." [6]

9. The United States District Court dismissed the federal actions, holding that "wise judicial administration" justified the dismissal of the cases in favor of Montana's Water Use Act.

10. The Blackfeet Tribe denies that Senate Bill 76 or any proceedings initiated pursuant to it are within the McCarran Amendment. On March 22, 1983, the Blackfeet Tribe submitted to this Court a Motion [7] which, among other things, challenges the interpretation of the McCarran Amendment as espoused by the parties to these Consolidated Cases.

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[5] No. 81-2188, Pet. for Cert., p. 8, Footnote 4, United States v. Aageson, *et al.*, No. CV-79-21-GF; United States v. AMS Ranch, Inc., *et al.*, No. CV-79-22-GF; Brief for Petitioners, pp. 27, *et seq.*

[6] *Ibid.*

[7] Motion To Suspend All Proceedings In This Court Respecting The Water Rights Of The Blackfeet Indian Tribe, Browning, Montana, And To Preclude The Solicitor General Or Any Other Attorney Of The Department Of Justice From Purporting To Represent That Tribe In These Proceedings and Points and Authorities In Support.

ARIZONA AND MONTANA STATE COURT CASES DO NOT PRESENT ISSUES RIPE FOR ADJUDICATION

11. Stressed in the accompanying Motion is the fact that the Arizona and Montana State Water Rights Adjudication Proceedings do not present issues that are ripe for disposition. The relief sought in the Consolidated Cases constitutes a request for an advisory opinion.

PETITIONER TRIBES ARE REAL PARTIES IN INTEREST

12. In both the Arizona and Montana cases, the State Court Water Rights Adjudication Proceedings directly involve the Reserved Rights of the Tribes here petitioning this Court to permit the Tribes to raise the jurisdictional question as to the applicability of the McCarran Amendment to those proceedings. It is the Tribes' Reserved Rights which are the subject *res* of the proceedings in question.

WHEREFORE, the Petitioners White Mountain Apache Tribe and the Blackfeet Indian Tribe respectfully pray this Court for leave to file here their Motion To Dismiss For Want Of *In Personam* And Subject Matter Jurisdiction due to the inapplicability of the McCarran Amendment to the State Court Water Rights Adjudication Proceedings.

Respectfully submitted,

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June 3, 1983

Nos. 81-2147, 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ARIZONA, *et al.*,
Petitioners,
v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND
THE NAVAJO TRIBE OF INDIANS, *et al.*,

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NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*

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QUESTIONS PRESENTED

1. Whether this Court should not first determine the threshold question of its jurisdiction over the State Court Water Rights Adjudication Proceedings to ascertain if they are within the limited Congressional waiver of sovereign immunity from suit by the McCarran Amendment, 43 U.S.C. 666, prior to considering the questions presented by the Petitioners?

2. Whether in determining the threshold question of its jurisdiction over the State Court Water Rights Adjudication Proceedings this Court must inquire into the adequacy of the records before it in these Consolidated Cases respecting the subject *res* actually in litigation in the States of Arizona and Montana among adversary parties, the status of the proceedings, the ripeness of them for disposition, and, if disposition of them at this time is premature, will a determination respecting the State Court Water Rights Adjudication partake of an advisory opinion?

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OPINIONS BELOW

The opinion of the court of appeals in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. A) is reported at 668 F.2d 1093; *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 26-52) is reported at 668 F.2d

1080. The opinion of the district court in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. E) is reported at 484 F. Supp. 778 (D. Ariz.). The opinion of the district court in *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 53-61) is reported at 484 F. Supp. 31 (D. Mont.).

JURISDICTION

The judgment of the court of appeals in *San Carlos Apache Tribe* v. *Arizona*, was entered on February 23, 1982. The judgment of the court of appeals in *Northern Cheyenne Tribe* v. *Adsit* was entered on February 22, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 20 of the Enabling Act for Arizona, 36 Stat. 569, and Article XX, Section 4, of the Arizona Constitution are reproduced in relevant part at 81-2147 Pet. 2-3. Section 4 of the Enabling Act for Montana (and other States) of Feb. 22, 1889, ch. 180, 25 Stat. 676-677, and Ordinance No. I of the Montana Constitution of 1889 and Article I of the Montana Constitution of 1972 are reproduced in relevant part at 81-2188 Pet. 3-4. The McCarran Amendment, 43 U.S.C. 666, is reproduced at 81-2147 Pet. 3-4 and 81-2188 Pet. 4-5.

STATEMENT

Solely for the purpose of denying that this Court has *in personam* and subject matter jurisdiction, pursuant to the McCarran Act,[1] or otherwise, over the State Court

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[1] United States Code, Title 43:

Section 666. Suit for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United

Water Rights Adjudication Proceedings included in these Consolidated Cases,[2] the White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona,[3] and the Blackfeet Indian Tribe, Blackfeet Reservation, Browning, Montana,[4] duly recognized by the Secretary of

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States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; *Provided* . . . .

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

[2] This motion does not pertain to the cases initiated by the United States or by the Tribes in either the United States District Courts for Arizona or Montana; it pertains strictly to the State Court Water Rights Proceedings initiated in those states pursuant to state law.

[3] Due to the gravely deficient records in these consolidated cases, this Court must speculate as to the nature, extent, parties, and subject matter of the State Court proceedings. In 81-2147, without documentation, the Arizona Petitioners, using only conclusional statements, refer to general adjudication proceedings in that State, and declare: "On November 25, 1981, the Arizona Supreme Court consolidated the adjudication of the Salt and Verde Rivers into the Gila River system adjudication." (See 81-2147 Pet. for Cert., pp. 6, 7, 8).

[4] In No. 81-2188 Pet. Brief, p. 27, Montana v. Northern Cheyenne Tribe, the record is equally deficient. The reference to the State Court proceeding and the character and extent of those proceedings

the Interior, move this Court for an order dismissing the Arizona and Montana State Court Water Rights Adjudication Proceedings upon the following grounds and for the following reasons.

FALLACIOUS ASSUMPTIONS OF JURISDICTION

Jurisdiction of this Court pursuant to the McCarran Amendment over the State Court Water Rights Adjudication Proceedings in Arizona and Montana is a threshold question which must be resolved by this Court antecedent to considering the questions which have been presented to it by Petitioners and Respondents.[5]

It is irresponsible for the Solicitor General to adopt this fallacious assumption which is contrary to both facts and law:

> Here, as throughout this brief, we assume that a general stream adjudication has been initiated in the State court. That is the situation in Arizona and Montana . . . ."

The records before this Court reject that assumption adopted by the Solicitor General. That false assumption is reflective of the grossly deficient record before this Court in these Consolidated Cases.

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is limited to the statement that Montana's Water Use Act, Senate Bill 76, refers simply to the state-wide adjudication of all existing rights. There is no documentation as to the nature of on-going state water rights proceedings, the parties, or the subject matter.

[5] In Nos. 81-2147 and 81-2188 Petitioners Arizona and Montana present virtually identical questions: Do the disclaimer provisions in the Enabling Acts and Constitutions deprive state courts of jurisdiction to adjudicate Indian rights to the use of water; and was it "wise judicial administration" for the Federal Courts of Arizona and Montana to dismiss pending Federal cases out of deference to state court general adjudications. Stressed here is the fact that neither Arizona nor Montana have on-going general adjudication proceedings within the purview of the McCarran Amendment.

ARIZONA'S STATE COURT PROCEEDINGS ARE PARTIAL, NOT GENERAL, ADJUDICATIONS—OUTSIDE McCARRAN AMENDMENT

The Salt River and major tributaries of that stream arise upon, traverse, border, and underlie the Fort Apache Indian Reservation. Appendix A of this motion is a map of the Salt and Gila Rivers drainage systems. Movant Tribe asserts reserved rights in those streams.[6] On February 5, 1979, the Movant Tribe received a Notice that a proceeding had been initiated to adjudicate a limited segment of the Salt River. Accompanying that Notice was a petition seeking a determination of the "Conflicting Rights to the Use of Water *from the Salt River Above Granite Reef Dam.*" [7]

The White Mountain Apache Tribe removed the partial proceedings on the Salt River to the United States District Court. On May 30, 1979, it moved to dismiss those proceedings on the grounds that both the United States Trustee and the White Mountain Apache Tribe were immune from suit. Stressed in the Motion, which is Appendix B here, is the fact that the partial adjudication of the Salt River was not within the purview of the McCarran Amendment.

On January 18, 1980, the District Court denied the Tribe's Motion to Dismiss.[8] That Court declared that state created rights would be determined by the laws of Arizona and that federal rights would be subject to federal law. Predicated upon that rationale, the District

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[6] The White Mountain Apache Indian Reservation was created by Executive Orders issued November 9, 1871 and December 14, 1872, I Kappler 2nd Ed. at pp. 810, et seq.; changed to Fort Apache Indian Reservation June 7, 1897 (30 STAT. 64).

[7] Nos. 81-2147 and 81-2188, Joint Appen., Vol. 1, pp. 142 *et seq.*, pp. 147 *et seq.*, pp. 153 *et seq.* (Emphasis supplied)

[8] In re Matter of the Determination of Conflicting Rights, 484 F. Supp. 778, 784 (U.S.D.C. D. Ariz. 1980); No. 81-2147 Pet. for Cert., Appen. E.

Court concluded that it would be difficult to imagine how the partial adjudication of the Salt River above Granite Reef Dam "could be considered as anything less than a general adjudication of water rights."[9] The District Court totally misconceived the nature of a general stream adjudication proceeding.[10]

Neither the order remanding to the state court nor the dismissal of the Tribe's motion was subject to appeal.

United States and the Papago Indian Tribe v. City of Tucson [11]

There is pending in the United States District Court for the District of Arizona the Upper Santa Cruz River litigation. There are approximately 1700 defendants involved in that Federal Court case. The Santa Cruz River, the rights to which are the subject *res* of that case, is a major tributary of the Gila River (See Map, Appendix A). That Federal proceeding is outside of and separate from the partial adjudication pending in the Arizona State Court.

MONTANA'S "SENATE BILL 76" IS NOT A "GENERAL ADJUDICATION" WITHIN THE McCARRAN AMENDMENT

On April 5, 1979, the Department of Justice filed a Complaint in the District Court for Montana seeking to adjudicate rights in the Milk and St. Mary Rivers.[12] Both streams arise upon, traverse, border, and underlie the Blackfeet Indian Reservation,[13] and Movant Tribe asserts

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[9] *Ibid.*, at Appen. E-13.

[10] See *Infra*, at p. 8.

[11] See Senate Report No. 97-568, 97th Cong., 2nd Sess., p. 40.

[12] Nos. 81-2147 and 81-2188, Pet. for Cert., Joint Appen., pp. 82A, *et seq.*; United States v. Aageson, *et al.*, CV-79-21-GF; United States v. AMS Ranch, Inc., et al., CV-79-22-GF.

[13] Treaty with the Blackfeet, 1855, Kappler, *Indian Treaties, 1778-1878*, p. 736 (11 Stat. 657).

Reserved Rights in both Rivers. The Department of Justice likewise filed a complaint in the Federal Court for Montana to adjudicate rights in Two Medicine River, Cutbank Creek, Birch Creek, and other tributaries of the Marias River. Those streams rise upon, traverse, border, and underlie the Blackfeet Indian Reservation and Movant Tribe claims reserved rights in those streams.

While the cases of *United States* v. *AMS* and *United States* v. *Aageson* were pending, the Montana legislature enacted "Senate Bill 76." Objective of that bill was statewide adjudication of all rights to the use of water in Montana whether or not a conflict exists.[14] Pursuant to that Act, the Montana Supreme Court entered an order requiring all parties to file their claims to the rights to the use of water or be "conclusively" presumed to have abandoned those rights. No on-going judicial proceeding is referred to in the record in No. 81-2188.[15]

On November 29, 1979, the presiding judges in the several divisions of the Montana federal court entered an order dismissing the above-mentioned *AMS Ranch, Inc.*, and the *Aageson* cases initiated in that Court.[16] That dismissal was predicated ". . , on the basis of wise judicial administration. . . ." on the mistaken concept that Senate Bill 76 was a state court general adjudication proceeding.[17]

In Petitioner Montana's brief, it is recited that "Water adjudication throughout the entire state of Montana has continued to proceed according to the terms of the legis-

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[14] No. 81-2188, Pet. for Cert., Appen. G., at 102 *et seq.*

[15] Ibid., Appen. H, p. 133, to which is attached the order of the Montana Supreme Court, that document being designated Exhibit A of Appen. H of this record.

[16] *Supra*, at p. 6, footnote 12.

[17] No. 81-2188, Appen. E., p. 53, *et seq.*; p. 61.

lation." [18] Other than that conclusional declaration, the record is devoid of any decrees or other evidence of any judicial proceedings. Montana seeks to substitute legislation for judicial process.

ARGUMENT

Immunity From Suit

Both the National Government and the Movant Tribes are immune from suit.[19] Petitioners have failed in their burden to prove that their water rights proceedings are within the McCarran Amendment. That waiver of immunity "cannot be implied" but rather "must be unequivocally expressed" in regard to the State Court Water Rights Adjudications.[20]

McCarran Amendment Limited To "General Adjudications"

This Court has specifically declared in *Dugan* v. *Rank* that the waiver of sovereign immunity from suit is limited to "general adjudications." [21] In thus defining the scope of the McCarran Amendment, this Court utilized a term of art in the field of western water law. A suit within the meaning of the term "general adjudication"

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[18] No. 81-2188, Brief for Pet., p. 31.

[19] Minnesota v. United States, 305 U.S. 382, 386-389 (1939); United States v. Testan, 424 U.S. 392, 399 (1976); United States v. U.S. Fidelity Co., 309 U.S. 506, 512 (1939). Immunity of the Tribe from suit is well established: White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4; 480 P.2d 654 (1971); Graves v. White Mountain Apache Tribe, 117 Ariz. 32; 570 P.2d 803 (CA Ariz. 1977); Colliflower v. Ft. Belknap Community Council, —— Mt. ——; 628 P.2d 1091, 1093 (1981).

[20] United States v. Testan, *supra*. See Belknap v. Schild, 161 U.S. 10, 16 (1895).

[21] 372 U.S. 609 (1963).

involves all persons who are claiming rights from a given stream. That is the terminology utilized by this Court in its *Pacific Livestock Company* case.[22] It has been declared, based upon an abundance of authority, that:

> *For the plaintiff to rely on the statute,* [McCarran Amendment] *the action must be for a general adjudication, so that all water users in the watershed must be joined, and the prayer must be for an adjudication of the rights of each party.*[23]

Partial Salt River Adjudication Proceeding Not Within McCarran Amendment [24]

There has been reviewed above, taken from the Joint Appendix supplied to this Court by Petitioners Arizona and Montana, the basic documents proving the partial character of the Salt River adjudication. A principal Petitioner here is the Salt River Water Users' Association. That Association initiated a proceeding which is identical with the partial adjudication of the Salt River above Granite Reef Dam. The District Court for the District of Arizona, respecting that partial adjudication, precisely the case that is here for review, declared the case was not within the purview of the McCarran Amendment. It used this language

> *For petitioner* [Salt River Water Users'] *Association to rely on this authority* [43 U.S.C. 666, McCarran Amendment] . . . *all landowners in the watershed, or who appropriate from it, must be or have been*

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[22] Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 447 (1916).

[23] Clark, *Water and Water Rights,* "General Adjudication Proceedings," Sec. 531.2, p. 514, 515. (Emphasis supplied) See Miller, *et al.* v. Jennings, 243 F.2d 157, 159 (CA 5, 1957); Cert. Den., 355 U.S. 827 (1957).

[24] *Supra,* at p. 5.

joined, and prayer must be made for an adjudication of each of their respective rights.[25]

That judicial declaration is controlling here.

Further evidencing the partial character of the Arizona state adjudications is the fact that the Santa Cruz River, a major tributary of the Gila River, is presently in litigation in the United States District Court for the District of Arizona.[26] It is too clear for serious challenge that the Arizona proceedings before this Court are outside the scope of the McCarran Amendment and for that reason this Court lacks jurisdiction.

Montana's "Senate Bill 76" Is Not A General Adjudication Encompassed Within The McCarran Amendment

Most assuredly the legislative pronouncement by Montana does not meet the specific requirements of the McCarran Amendment. A state-wide legislative declaration is not within the McCarran Amendment which relates to the judicial "adjudication of rights to the use of water of a river system or other source." [27]

Montana's record is devoid of any reference to judicial proceedings, subject matter, or parties to any action of the character that can be referred to as a general adjudication. As reviewed above, the McCarran Amendment waiver of immunity is limited strictly to general adjudication proceedings in a court of competent jurisdiction among adversary parties for the purpose of resolving conflicts respecting rights to the use of water within a given stream system. Senator McCarran was specific in regard to the objective of the amendment to which his name has been given. Relative to that amendment he said this:

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[25] Hurley v. Abbott, 259 F. Supp. 669, 670 (U.S.D.C. D. Ariz. 1966), citing Dugan v. Rank, supra. (Emphasis supplied)

[26] *Supra*, at p. 6.

[27] See above, p. 1.

> It is not intended to be used *for any other purpose* than to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all* of the rights of various owners *on a given stream.*[28]

There was no blanket waiver of sovereign immunity of the National Government or the Tribes from a generalized act of Montana's State Legislature.

Request For Advisory Opinion Should Be Rejected; State Court Proceedings Are Not Ripe For Adjudication

Petitioners in Nos. 81-2147 and 81-2188 have totally failed to present here judicial issues which are ripe for adjudication. Primarily the controversies turn upon proceedings that have not advanced to the point where they are more than piecemeal and partial proceedings. Indeed, Montana's proceedings are still legislative in character. Involved are:

> . . . uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.[29]

Relief sought here by Petitioners is, in substance, for an advisory opinion respecting highly speculative issues. Repeatedly this Court has refused to exercise its powers under Article III of the Constitution when requested to render advisory opinions.[30]

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[28] No. 81-2188, Montana v. Northern Cheyenne Tribe, Pet. for Cert., Appen. p. 163, letter dated August 25, 1951, from Senator Pat McCarran, Chairman, to Senator Warren G. Magnuson.

[29] 13 Federal Practice and Procedure, Wright, Miller, and Cooper, Ripeness, Sec. 3532; Supp. Sec. 3532, Ripeness, p. 182 *et seq.*

[30] United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947). See also Laird v. Tatum, 408 U.S. 1, 14 (1972).

CONCLUSION

This Court should grant the Movant Tribes' prayer to dismiss that phase of these Consolidated Cases pertaining to the State Court Water Rights Adjudication Proceedings. Those State proceedings, being partial adjudication proceedings in both Arizona and Montana, are not within the purview of the McCarran Amendment, all as reviewed in full above.[31]

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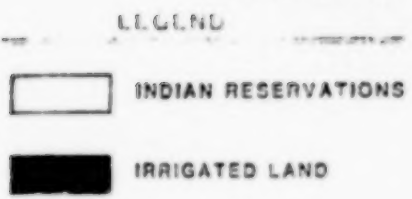
June 1983

[31] See, Immunity From Suit, supra, p. 8 *et seq.*

APPENDIX A



LOCATION MAP

U.S.-Papago Tribe
v.
City of Tuscon
Santa Cruz River Litigation

APPENDIX B

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Filed May 30, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Civil No. 79-182 PHX

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES,

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
Petitioner,

WHITE MOUNTAIN APACHE TRIBE,
Defendant.

Civil No. 79-182 PHX

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES,

STATE OF ARIZONA,
Movant,

WHITE MOUNTAIN APACHE TRIBE,
Defendant.

MOTION TO DISMISS

Comes now the White Mountain Apache Tribe, Fort Apache Indian Reservation, Defendant (Claimant) in the above-entitled proceedings, to allege and to aver as follows.

1. The White Mountain Apache Tribe is a duly organized Tribe of Indians exercising its inherent sovereign power of self-government and has been fully recognized by the United States of America, Trustee, acting by and through the Secretary of Interior, as a Tribe organized pursuant to 25 U.S.C. 476, and has the status of beneficiary pursuant to the National trust.

2. The White Mountain Apache Tribe was served with a Notice in the above-entitled proceedings on February 5, 1979, by the Water Rights Division, Arizona State Land Board, all in accordance with 45-231, Arizona Revised Statutes, that statute having since been repealed.

3. On March 7, 1979, the White Mountain Apache Tribe filed its Petition for Removal upon the grounds and for the reason that the action initiated by the Salt River Water Users' Association to have determined the conflicting rights to the use of water in the limited reach of the Salt River, all as set forth in the caption, gives rise to federal issues which are substantial and important and which arise pursuant to the Constitution, laws, and treaties of the United States.

4. The White Mountain Apache Tribe, on April 26, 1979, filed its Response to the Motion to Remand, dated March 19, 1979, which was filed by Petitioner Salt River Water Users' Association.

5. In its Response to the Motion to Remand filed by the Petitioner Water Users' Association, the White Mountain Apache Tribe, predicated upon an abundance of authority, urged that the proceedings in question do not

come within the purview of the McCarran Amendment, 43 U.S.C. 666 and, as a consequence, the White Mountain Apache Tribe, which has never waived its sovereign immunity from suit and has not been deprived of its sovereign immunity from suit by the United States, is immune from suit and cannot be subjected to the jurisdiction of the courts or agencies of Arizona in these proceedings.[1]

6. Additionally, the White Mountain Apache Tribe respectfully avers to this Honorable Court that the repeal and changes in the Arizona Law, pursuant to which the Salt River Water Users' Association purportedly proceeded here against the White Mountain Apache Tribe, and the amendments and the modifications in the Act, pursuant to which the jurisdiction of these proceedings was transferred to the Superior Court of Maricopa County, State of Arizona, do not bring these proceedings within 43 U.S.C. 666 and the Tribe remains immune from suit and is not subject to jurisdiction in this action.[2]

7. From the face of the Petition filed by the Salt River Water Users' Association, which was made part of the Petition for Removal filed by the White Mountain Apache Tribe, the deficiency of the proceedings is disclosed, since those proceedings, which purport to determine and to adjudicate the conflicting rights to the use of water

(a) from the Salt River and its tributaries including Tonto Creek above *Granite Reef Dam* and

(b) excluding the Verde River and its tributaries,

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[1] See, Response To Motion To Remand at page 18, line 13, "43 U.S.C. 666 Is Not Applicable Here; Is No Bar To Removal, If It Were Applicable."

[2] See, Revised Laws, State of Arizona, Sen., 34th Legislature, 1st Regular Session, 1979, Ch. 139, Sen. Bill 1239, compiled and issued by Rose Mofford, Secretary of the State, for use until session laws are printed.

fall short of being a general adjudication, a term of art, within the purview of 43 U.S.C. 666, sometimes referred to as the McCarran Act.

8. On May 14, 1979, there was filed by the Salt River Water Users' Association a "Reply" allegedly to the "Response" of the White Mountain Apache Tribe to the Salt River Water Users' Association "Motion To Remand." By that Reply, the Salt River Water Users' Association removed any doubt that the proceedings initiated by it are not a "general adjudication" and do not come within the waiver of sovereign immunity from suit in regard to "general adjudications," as provided by 43 U.S.C. 666, the McCarran Amendment.

WHEREFORE, THE WHITE MOUNTAIN APACHE TRIBE RESPECTFULLY MOVES THIS HONORABLE COURT TO DISMISS these proceedings upon the following grounds and for the following reasons:

1. The White Mountain Apache Tribe is immune from suit;
2. The White Mountain Apache Tribe has not waived its immunity from suit;
3. Congress has not waived the immunity of the White Mountain Apache Tribe from suit;
4. The proceedings initiated by the Salt River Water Users' Association did not and do not come within the purview of 43 U.S.C. 666, referred to as the McCarran Amendment;
5. The revised statute, which was adopted in substitution of the Act giving rise to these proceedings and which conferred jurisdiction upon the Superior Court of Maricopa County, does not come within the purview of 43 U.S.C. 666.

There is incorporated into this Motion by reference the attached Memorandum of Points and Authorities in sup-

port of this Motion to Dismiss. In the Memorandum of Points and Authorities, there is reviewed in detail the authorities which preclude the application of 43 U.S.C. 666 to these proceedings.

RESPECTFULLY SUBMITTED this 30th day of May 1979.

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/s/ William H. Veeder

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Office - Supreme Court, U.S.
FILED
JUN 14 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF THE UNITED STATES TO MOTION FOR LEAVE TO FILE AND MOTION TO DISMISS FOR LACK OF JURISDICTION

REX E. LEE
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TABLE OF AUTHORITIES

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Statutes:

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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2147

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

No. 81-2188

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF THE UNITED STATES TO MOTION FOR LEAVE TO FILE AND MOTION TO DISMISS FOR LACK OF JURISDICTION

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1. Needless to say, on the ground of gross untimeliness alone, the attempt of the two moving Tribes to intervene in these cases at this eleventh hour appropriately might be denied. One of them, the White Mountain Apache Tribe of Arizona, pointedly refused to press its water claims in any court, and, accordingly, has never been a party here, directly or indirectly. See *White Mountain Apache Tribe* v.

Smith & Watt, petition for cert. pending, No. 81-2334. The other, the Blackfeet Tribe of Montana, was content, until the eve of oral argument in this Court, to be represented by the United States. But, even though not separate parties, either Tribe could have sought leave to file a timely brief *amicus curiae* in this Court.

Nevertheless, we interpose no objection to the Court's consideration of the "Motion to Dismiss" on its merits. It may be that the resolution of the pending cases will be assisted by taking into account the proposed submission.

2. We cannot support the so-called "Motion to Dismiss," as framed. Indeed, we do not appreciate how this Court properly could take any action with respect to the "State court water rights adjudication proceedings" which are not here for review. The Court has before it only the several judgments of the United States Court of Appeals for the Ninth Circuit and, obviously, the decision rendered here must be directed to that court, not the State courts of Arizona or Montana.

To be sure, if this Court affirms the court below insofar as it directed the federal district courts to proceed to adjudicate the Indian water rights, it would follow that the State proceedings, to that extent, should be dismissed or stayed. But this Court need enter no such order. We take it for granted that, once the Court has made its decision, the State courts will abide the result.

More fundamentally, however, we agree with Movants that this Court ought not approve the dismissal of the federal court action unless it first concludes that the Indian water rights can be adjudicated in the pending State court proceedings in Arizona and Montana. Other objections aside, the indispensable condition is that the State proceedings qualify as "general stream adjudications" as to which the sovereign immunity of the United States has been

waived by the McCarran Amendment, 43 U.S.C. 666. This is, of course, the basic premise of the *Akin* rule of "wise judicial administration." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817-820 (1976).

3. The federal district court in the Arizona cases concluded, albeit without elaboration, that the State court proceedings satisfied the conditions of the McCarran Amendment. 81-2147 Pet. App. E8, E13. The district court in Montana took the same view of the State court proceedings involved there, again with little more than a conclusory statement. 81-2188 Pet. App. 60-61. The court of appeals, reversing on other grounds, did not resolve the question in any of the cases. 81-2147 Pet. App. A9-A11, B3-B4; 81-2188 Pet. App. 41-45.[1] For our part, as Movants point out (Motion 4), we have asserted that the proceedings pending in the Arizona and Montana courts qualify as general stream adjudications for the purpose of the McCarran Amendment. See U.S. Br. 33 n.23.

Our concession was compelled, we believed, by this Court's rejection of the arguments tendered in *United States* v. *District Court for Eagle County*, 401 U.S. 520, 525-526 (1971), and *United States* v. *District Court for Water Division No. 5*, 401 U.S. 527, 529-530 (1971). See U.S. Br. 30-31. Nothing in the present Motion leads us to a different conclusion. We cannot fault the Arizona courts for excluding from the pending proceedings, at least preliminarily, waters already adjudicated by other courts—notably the rights determined by a State court succeeding the Territorial court in *Hurley* v. *Abbott*, No. 4564 (D.

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[1] In the Montana cases, the court below recited the arguments made, on the one side, that the federal proceedings were "piecemeal," and, on the other, that the State proceedings lacked "comprehensiveness." 81-2188 Pet. App. 41-42. But we find no indication that the court resolved the issue.

Ariz. Mar. 1, 1910) (the so-called "Kent Decree"),[2] and those determined by the federal district court in *United States* v. *Gila River Irrigation District*, No. E-59-Globe (D. Ariz. June 29, 1935) (often called the "Globe Equity Decree"), referred to in *Arizona* v. *California*, 376 U.S. 340, 348-350 (1964)).[3] A fortiori, there can be no complaint that Arizona has not presumed to assert jurisdiction over Indian water rights within the upper Santa Cruz River basin (see Motion 6, 10), which Congress effectively has settled. See Act of Oct. 12, 1982, Pub. L. No. 97-293, Sections 301-315, 96 Stat. 1274-1285.[4] Nor do we appreciate in what respect Movants find the Montana State court proceedings lacking in comprehensiveness. See Motion 6-8, 10-11.

On the other hand, although the sufficiency of the State court proceedings has been challenged by some of the parties (see, *e.g.*, Brief of San Carlos Apache Indian Tribe 79-95), it is right to say that the question has not been fully briefed in this Court and that the opinions below offer little

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[2]The "Kent Decree" is reprinted in *Indian Water Rights of the Five Central Tribes of Arizona: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 149-226 (1975).

[3]The exact scope of the *Kent* and *Globe Equity* decrees is disputed and we do not intend here to suggest any view on that question. What is more, we are advised that interested parties recently have sought to expand the new State court proceedings to embrace the areas covered by those decrees.

[4]The reference to *United States and Papago Indian Tribe* v. *City of Tucson*, No. 75-39 TUC (JAW), as a case "pending in the United States District Court for the District of Arizona" (Motion 6) is misleading. The legislation referred to expressly provides for dismissal of that action, and it is anticipated that this will occur. See Pub. L. No. 97-293, Sections 307(a)(1)(C) and (2), 96 Stat. 1281, 1282. Moreover, as we are advised, the *res* of that litigation is mainly groundwater, not the waters of "a major tributary of the Gila River," as represented by Movants. See Motion 6.

assistance on the issue. Of course, "[i]f there is any substantial doubt" as to whether "the parallel State-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties," "it would be a serious abuse of discretion" for the federal court to dismiss the case filed there. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, No. 81-1203 (Feb. 23, 1983), slip op. 25. Accordingly, it is arguable that the question should be remitted to the court of appeals if this Court deems it dispositive.

We add only that, under our submission, a federal court whose jurisdiction is timely invoked for the purpose of quantifying Indian water rights ought to proceed, *regardless* whether the contemporary State court proceedings satisfy the McCarran Amendment. If the Court were to agree, the issue discussed by Movants—and predictably by others in future cases—would be mooted.

4. Returning to the pending motions, we summarize our conclusion. Treating the papers tendered as a submission *amicus curiae* by interested nonparties, we suggest the Court grant leave to file. Although the "Motion to Dismiss," as a formal matter, must be denied, we believe the Court should consider the objection that the State courts lack jurisdiction under the McCarran Amendment. If, contrary to our own primary submission, that issue is deemed critical to the result, we urge the Court to lay the matter to rest by rejecting the challenge.[5] Alternatively, the cases

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[5]We are here focusing only on the question whether the Arizona and Montana State court proceedings qualify as "general stream adjudications." We adhere to what has been said about the inappropriateness of the State forum, on other grounds, for the adjudication of Indian water rights. See U.S. Br. 15-39; U.S. Post-Argument Memo. 9 n.5.

NO. 81-2147-CFX	TITLE	Arizona, et al., Petitioners
(Vide: 81-2188)		v.
		San Carlos Apache Tribe of Arizona, et al.

DOCKETED	COURT
May 12, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
RULE 19.4 case	
	Counsel for Petitioners: John B. Weldon, Jr.
	Counsel for Respondents: Solicitor General
May 12, 1982	Petition for writ of certiorari filed.
May 24, 1982	Order extending time to file a response to the petition until July 11, 1982. (FOR ALL RESPONDENTS).
June 22, 1982	Order further extending time for all respondents to file a response to the petition until July 21, 1982.
July 6, 1982	Brief, amicus curiae, of the State of South Dakota filed.
July 13, 1982	Brief, amicus curiae, of the State of Washington filed.
July 16, 1982	Brief, amici curiae, of the States of Idaho, North Dakota, et al. in support of petition filed.
July 19, 1982	Order extending time to file a response to the petition until Aug. 20, 1982.
July 20, 1982	Brief, amicus curiae, of the State of Wyoming filed.
Aug. 13, 1982	Brief for respondent Ft. McDowell Mohave-Apache Indian Community in opposition filed.
Aug. 18, 1982	Memorandum for the U.S. filed. (Also in 81-2188)
Aug. 20, 1982	Brief for the Navajo Nation in opposition filed.
Aug. 23, 1982	Brief of respondent Salt River Pima-Maricopa Indian Community in opposition filed.
Aug. 24, 1982	Brief of respondents' San Carlos Apache Tribe of Arizona and Payson Community of Yavapai Apache Indians in opposition filed.
Aug. 25, 1982	DISTRIBUTED. SL21P1
Sept. 2, 1982	Reply brief for the petitioners filed. (D).
Oct. 4, 1982	Petition GRANTED. The case is consolidated with 81-2188 and a total of one and one-half hour is allotted for oral argument.

Nov. 18, 1982	Brief, amicus curiae, of the State of New Mexico in support of petitioners filed. (Vide: 81-2188).
	(Over)

81-2147

Title

No.

DATE	PROCEEDINGS AND ORDERS
	2nd case: Arizona, et al., Petitioners v. Navajo Tribe of Indians, et al.
Nov. 19, 1982	Joint appendix filed. (Vide: 81-2188) (Volume 1).
Nov. 19, 1982	Brief for petitioners in 81-2147 filed. (Vide: 81-2188).
Nov. 18, 1982	Brief, amicus curiae, on Behalf of The Colorado River Water Conservation District and the Southwestern Water Conservation District in support of petitioners filed. (Vide: 81-2188).
Nov. 22, 1982	Joint appendix filed. (Vide: 81-2188). (Volume II).
Nov. 22, 1982	Brief for petitioner State of Montana, et al. filed. (Vide: 81-2188).
Nov. 22, 1982	Brief, amici curiae, of States of Washington, Utah and Idaho filed. (Vide: 81-2188).
Nov. 22, 1982	Brief, amicus curiae, of the State of Colorado filed. (Vide: 81-2188).
Nov. 22, 1982	Brief, amicus curiae, of the State of South Dakota filed.
Nov. 22, 1982	Brief, amicus curiae, of the State of Wyoming filed. (Vide: 81-2188).
Dec. 2, 1982	Motion of the Solicitor General for divided argument filed. (Also in 81-2188)
Dec. 5, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 81-2188).
Dec. 3, 1982	Motion of Wyoming for leave to participate in oral argument as amicus curiae and for additional time for argument filed. (Also in 81-2188)
Dec. 6, 1982	Motion of petitioners in No. 81-2188 for additional time for oral argument filed. (In both cases).
Dec. 6, 1982	Motion of petitioners in No. 81-2188 for divided argument filed. (In both cases).
Dec. 8, 1982	Motion of petitioners in No. 81-2147 for review of Clerk's action granting respondents' request for an extension of time for filing briefs on the merits filed.
Dec. 9, 1982	DISTRIBUTED. 12-10. (Above motion).
Dec. 3, 1982	Order extending time to file the respondents' brief on the merits until Jan. 21, 1983.
Dec. 13, 1982	The motion of petitioners in No. 81-2147 for review of Clerk's action granting respondents' request for an extension of time for filing briefs on the merits is DENIED. The motion of the Solicitor General for divided argument is GRANTED. The motion of petitioners in No. 81-2188 for divided argument is GRANTED. (OVER).

NO. 81-2147-CFX | TITLE Arizona, et al., Petitioners,
v.
San Carlos Apache Tribe of Arizona, et al.

DOCKETED	COURT
May 12, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	The motion of petitioners in No. 81-2188 for additional time for oral argument is DENIED. The motion of petitioners in No. 81-2147 for divided argument is GRANTED and the request for additional time for oral argument is DENIED. The motion of Wyoming for leave to participate in oral argument as amicus curiae and for additional time for argument is DENIED.
Jan. 21, 1983	Brief of respondent, James Bowen filed. (Vide: 81-2188)
Jan. 21, 1983	Brief of respondent, Salt River Pima-Maricopa Indian Community filed. (Vide 81-2188)
Jan. 21, 1983	Brief of respondent, Navajo Nation filed. (Vide: 81-2188)
Jan. 21, 1983	Brief of respondent, Ft. McDowell Mohave-Apache Indian Community filed. (Vide: 81-2188)
Jan. 24, 1983	Brief of respondent Crow Tribe of Indians filed. (Vide: 81-2188)
Jan. 21, 1983	Brief of the U.S. filed. (Vide: 81-2188)
Jan. 25, 1983	Brief, amicus curiae, of the Jicarilla Apache Tribe in support of respondents filed. (Vide: 81-2188).
Jan. 26, 1983	Brief for respondent San Carlos Apache Indian Tribe filed. (Vide: 81-2188).
Feb. 15, 1983	CIRCULATED.
Feb. 25, 1983	Reply brief for petitioners in No. 81-2147 filed. (D). (Vide: 81-2188)
March 14, 1983	Reply brief for petitioners State of Montana, et al. in No. 81-2188 filed. (D). (Vide: 81-2188).
March 22, 1983	Motion of Blackfeet Indian Tribe to suspend all proceedings in this Court rec'd. (Also in 81-2188).
March 23, 1983	ARGUED.
Mar. 28, 1983	← Motion of the United States to file a brief after argument filed. (Also in 81-2188).
March 29, 1983	DISTRIBUTED. 4-1. (Above motion).
March 31, 1983	Motion of petitioners in No. 81-2147 for leave to file a response to the brief of the United States after argument filed. (NP).
March 31, 1983	DISTRIBUTED. 4-1. (Above motion).
March 31, 1983	Opposition to motion of the Solicitor General for leave to file a supplemental brief after argument filed by Montana. (D).

(Over)

81-2147

Title

No.

DATE	PROCEEDINGS AND ORDERS
April 4, 1983	The motion of the Solicitor General for leave to file a supplemental brief, after argument, is GRANTED. The motion of petitioners in No. 81-2147 for leave to file a response to the supplemental brief, after argument, is GRANTED.
Apr. 14, 1983	Motion of petitioners in No. 81-2188 for leave to file a response to the memorandum of the United States after argument filed. (Also in 81-2188).
Apr. 14, 1983	Motion of respondent Navajo Nation in No. 81-2147 for leave to file a brief after argument filed. (NP). (Also in 81-2188).
Apr. 19, 1983	DISTRIBUTED. 4-22 (Above two motions).
Apr. 25, 1983	The motion of petitioners in No. 81-2188 for leave to file a response to the memorandum of the United States, filed after argument, is granted. The motion of respondent Navajo Nation in No. 81-2147 for leave to file a brief, after argument, is granted.
May 10, 1983	Motion of respondents San Carlos Apache Tribe of Arizona, et al. for leave to file a supplemental brief after argument filed. (Also in 81-2188).
May 16, 1983	DISTRIBUTED. 5-19. (Motion of respondents San Carlos Apache Tribe, et al. for leave to file a supplemental brief after argument).
May 23, 1983	The motion of respondents San Carlos Apache Tribe of Arizona, et al. for leave to file a supplemental brief after argument is GRANTED.
June 3, 1983	Motion of White Mountain Apache Tribe, et al. for leave to file memorandum after argument filed. (NP)
June 6, 1983	DISTRIBUTED. June 9, 1983. (Above motion).
June 13, 1983	DISTRIBUTED. 6-16. (Above motion).
June 14, 1983	Response of the Solicitor General to motion of White Mountain Apache Tribe filed.
July 1, 1983	The motion of the Blackfeet Tribe to suspend all proceedings in this Court rejecting the water rights of the Blackfeet Indian Tribe Browning, Montana, and to preclude the Solicitor General or any other attorney of the Department of Justice from purporting to represent that Tribe in these proceedings is denied. The motion of the White Mountain Apache Tribe and the Blackfeet Indian Tribe for leave to file a motion to dismiss for lack of in personam and subject matter jurisdiction in this Court over the state court water rights adjudication proceedings is denied. Treating the papers whereon the motion was submitted as a motion for leave to file a brief amicus curiae, and treating the accompanying papers as a brief amicus curiae, leave to file the brief is granted. Adjudged to be REVERSED and REMANDED. Dissenting opinion by Marshall, J. Dissenting opinion by Stevens, J., with whom Blackmun, J., joins.